No. 97-1396

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

VICKY M. LOPEZ, CRESCENCIO PADILLA, WILLIAM A. MELENDEZ, and DAVID SERENA, *Appellants*,

v.

MONTEREY COUNTY, CALIFORNIA, STATE OF CALIFORNIA, *Appellees*,

and

WENDY DUFFY, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF ON THE MERITS FOR APPELLANTS

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QUESTION PRESENTED

WHETHER A SECTION 5-COVERED JURISDICTION MAY IMPLEMENT VOTING CHANGES WITHOUT PRECLEARANCE–WHEN THE CHANGES WERE INITIALLY CREATED BY COUNTY ORDINANCES THAT THIS COURT ALREADY HAS DETERMINED TO BE SUBJECT TO SECTION 5–SIMPLY BECAUSE THE STATE, AN UNCOVERED JURISDICTION, SUBSEQUENTLY ENACTS LEGISLATION THAT INCORPORATES THE COUNTY'S PRIOR CHANGES.

List of All Parties in Lower Court Proceedings

The following is a list of all the parties to the proceeding in the lower court whose order and judgment of dismissal are under review:

Appellants:

Vicky M. Lopez, Crescencio Padilla, William A. Melendez, and David Serena.

Appellees:

Monterey County, California and the State of California.

Intervenor-Appellee

Wendy Duffy

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WENDY DUFFY, *Intervenor-Appellee*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANTS

OPINIONS AND ORDERS BELOW

This appeal seeks to review the Order Granting (1) Motion to Dismiss First Amended Complaint; and (2) Motion to Vacate Order Extending Judicial Terms filed on December 19, 1997. The Order is not yet reported and is reprinted in full in the Appendix to the Jurisdictional Statement (hereinafter cited as J.S. App., previously filed under separate cover). J.S. App. 1. The Judgment of Dismissal entered by the District Court on

December 22, 1997, is also not reported and is reprinted in full in the Appendix to the Jurisdictional Statement. J.S. App. 11.

Jurisdictional Statement

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253, 1291, and 42 U.S.C. § 1973c to review the Order Granting (1) Motion to Dismiss First Amended Complaint; and (2) Motion to Vacate Order Extending Judicial Terms filed by the United States District Court for the Northern District of California on December 19, 1997, and to review the Judgment of Dismissal entered by the District Court on December 22, 1997. The notice of appeal was filed on December 24, 1997, within the thirty-day time period specified by 28 U.S.C. § 2101(b). J.S. App. 13. Probable jurisdiction was noted on April 27, 1998.

Relevant Statutes and Regulations

42 U.S.C. § 1973c. The statute is reproduced in the Appendix to the Jurisdictional Statement. (J.S. App. 16).

Statement of the Case

Monterey County, California ("County") is subject to the § 5 preclearance provisions of the Voting Rights Act. Accordingly, the County must secure an administrative ruling from the United States Attorney General or a declaratory judgment from the District Court for the District of Columbia that a covered voting change enacted after November 1, 1968, does not have the purpose or the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group. 42 U.S.C. § 1973c; *Lopez v. Monterey County,* 519 U.S. 9, 117 S.Ct. 340, 343 (1996).

Despite this statutory mandate, the lower court ruled that a change in the County's voting practice—dependent upon ordinances already held by this Court to be subject to § 5—is

exempt from preclearance requirements. Its holding relied upon the premise that subsequently-enacted state statutes, which incorporated the County's ordinances, did not have to be precleared and obviated the need for preclearance of the ordinances. The lower court reasoned that because the State is not a § 5-covered jurisdiction, the County's voting change is now immunized from § 5 strictures.

The ruling is inconsistent with this Court's § 5 precedents and would undo decades of § 5 administrative practice involving partially covered states. If § 5 is to maintain its intended deterrent effect, it cannot be rendered meaningless simply because a county's otherwise covered voting change is incorporated into a statute enacted by an uncovered state.

Historical Background

The County had two municipal court and seven justice court districts on November 1, 1968. The courts were trial courts with limited jurisdiction.[1] The judges within each of the judicial districts were elected within the respective judicial district. Between November 1, 1968, and 1983, the County adopted a series of ordinances which ultimately consolidated the judicial districts into a single county-wide municipal court district.[2] *Lopez*, 117 S.Ct. at 344. County-wide judicial elections were conducted in 1986, 1988, and 1990. Presently, there are ten judgeships on the municipal court. In addition to the County's judicial district consolidation ordinances, the State of California

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[1] Justice court districts were eliminated as a result of a constitutional amendment adopted by the California electorate in 1995. J.S. App. 8, Order at 5.

[2] The First Amended Complaint provides a detailed chronology of the judicial district consolidation ordinances enacted by Monterey County. J.S. App. 83.

enacted laws which "have reflected changes in the County's judicial districts resulting from the consolidation process."[3] *Lopez*, 117 S.Ct. at 343-344. For example, 1979 Cal. Stats. ch. 694, § 2, consolidated the North Monterey County Judicial District into a single municipal court district. J.S. App. 32. The North Monterey County Judicial District was listed as a municipal court district in 1977 Cal. Stats. ch. 995, § 1. J.S. App. 30. However, the two statutes did not define the North Monterey County Judicial District. Such a district was defined by Monterey County Ordinance No. 2195, adopted by the Monterey County Board of Supervisors on August 10, 1976. J.S. App. 65.

None of the judicial district consolidation ordinances was submitted by the County for § 5 approval. In 1983, the State submitted for § 5 preclearance a statute which mentioned one such ordinance, providing for "Monterey County's prospective consolidation of the last two justice court districts with the remaining municipal court district." 1983 Cal. Stats. ch. 1249. J.S. App. 35. *Lopez*, 117 S.Ct. at 344. This County ordinance was Ordinance No. 2930, which the State submitted for § 5 approval. The District Court held that Ordinance No. 2930 had received the requisite § 5 approval. J.S. App. 7, Order at 6. Although Ordinance No. 2930 may have been precleared, this Court has already observed that none of the prior judicial district consolidation ordinances has ever been submitted for § 5 approval. Thus, "[u]nder our precedent, these previous consolidation ordinances do not appear to have received federal preclearance approval." *Lopez*, 117 S.Ct. at 345.

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[3] This Court listed these statutes in its prior opinion. One of the statutes listed was 1979 Cal. Stats. ch. 694, § 2, which was the statute the District Court relied upon to dismiss the present § 5 enforcement action. *Lopez*, 117 S.Ct. at 344, footnote "*".

Prior Proceedings

Appellants, who are Latino voters of Monterey County, filed this action on September 6, 1991. The case seeks injunctive relief against the implementation of the voting changes reflected in the County's judicial district consolidation ordinances because the ordinances have not received the requisite § 5 approval. The three-judge court initially held that the County's ordinances were subject to § 5 preclearance requirements but had not received § 5 approval. Subsequently, the County sought judicial preclearance from the District Court for the District of Columbia. *Monterey County v. United States*, Civ. Act. No. 93-1639 (D.D.C. filed August 10, 1993). The action was voluntarily dismissed after the County acknowledged that it was not able to demonstrate, as required by § 5, that several of the ordinances did not have a retrogressive effect on Latino voting strength. *Id.*

Thereafter, Appellants and the County submitted to the District Court for the Northern District of California proposed election plans for the court's approval. These election plans were opposed by the State and other intervenors on the basis that the plans violated certain constitutional provisions. The District Court enjoined the 1994 judicial elections and requested all the parties "to develop a workable solution." *Lopez*, 117 S.Ct. at 346. The parties were unable to resolve their differences. Subsequently, in a December 20, 1994 Order, the District Court ordered the County to implement a previously submitted division election plan in a special judicial election to be held on June 6, 1995. Under the division plan, there continued to be a single county-wide municipal court. However, judges would be elected from four divisions or election districts. The County's election district plan received § 5 approval from the Attorney General on March 6, 1995. Seven judges, with terms expiring in January 1997, were elected in the June 6, 1995 elections. *Lopez*, 117 S.Ct. at 346.

On November 1, 1995, the District Court changed course and, deciding that the interim election plan's constitutionality was in doubt, issued an Order reverting to a county-wide election to be held on March 26, 1996. As summarized by this Court, "[t]hus, in essence, four years after the filing of the complaint in this case, the District Court ordered the County to hold elections under the very same scheme that Appellants originally challenged under § 5 as unprecleared." *Lopez*, 117 S.Ct. at 346. On February 1, 1996, this Court granted a stay of the November 1, 1995 Order and noted probable jurisdiction on April 1, 1996. *Id.*

This Court held that the District Court committed legal error by implementing an election plan which reflected the County's policy choice of conducting county-wide judicial elections, when the county-wide election plan had not received the required § 5 preclearance. This Court expressly directed the County to comply with the preclearance requirements: "The requirement of federal scrutiny should be satisfied without further delay." *Lopez*, 117 S.Ct. at 349.

On remand, the State filed a motion to dismiss Appellants' First Amended Complaint and a motion to vacate the order extending judicial terms.[4] The State's motion to dismiss was based on several grounds which were expressly reserved by this Court for consideration on remand.[5] On December 19, 1997,

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[4] Following this Court's February 1996 stay order, the District Court extended the judicial terms of those judges whose terms would have expired in January 1997. J.S. App. 2, Order at 1.

[5] The District Court summarized these grounds into four categories: 1) intervening changes in state laws have superseded the county ordinances and thus the county-wide judicial election system has been converted into an election system mandated by state law rather than by county ordinances; 2) "the complaint is barred by laches"; 3) the Voting Rights Act was unconstitutionally applied when Monterey County was designated a jurisdiction subject to the § 5 preclearance provisions; and, 4) the county ordinances did not constitute voting changes subject to § 5 approval. The District Court did not address categories 2 through 4, finding that the first ground was dispositive in the dismissal of the Appellants' First Amended Complaint. J.S. App. 1, Order at 3.

the District Court dismissed the First Amended Complaint and denied a stay of its Order. J.S. App. 1, Order at 8. The judgment of dismissal was entered on December 22, 1997. J.S. App. 11. Notice of Appeal of the District Court's Order was filed on December 24, 1997. J.S. App. 13. On January 23, 1998, this Court granted a stay of the December 22, 1997, Order dismissing this action.

District Court's Order

The dismissal of the First Amended Complaint was premised upon the District Court's finding that 1979 Cal. Stats. chap. 694, previously codified in Cal. Gov. Code § 73560, consolidated three municipal courts into a single municipal court district for Monterey County.[6] The District Court held that the establishment of this single municipal court district was not subject to § 5 review because the State of California is not a designated jurisdiction subject to the § 5 preclearance

[6] The 1979 statute amended Cal. Gov. Code 73560 as follows: "There is in the county of Monterey, on and after the effective date of this section, a single municipal court district which embraces the former Salinas Judicial District, Monterey Peninsula Judicial District and North Monterey County Judicial District. This article applies to the municipal court established within the judicial district which shall be known as the Monterey County Municipal Court." J.S. App. 32.

requirements. According to the District Court's interpretation of § 5, the opening clause refers only to those political jurisdictions which have been specifically designated pursuant to § 4(b) of the Voting Rights Act: "[T]he plain language of the clause does not apply to an uncovered state which 'enact(s) or seek(s) to administer' a voting plan in a subordinate, covered county." J.S. App. 5, Order at 4. Since the State of California was not designated pursuant to § 4(b), the District Court reasoned, state statutes mandating the implementation of voting changes in a § 5-covered county are not subject to § 5.

I. Summary of Argument

The principal issue before this Court is whether an admitted change in voting practice in a § 5-covered county is exempt from preclearance requirements simply because the state is not subject to § 5 preclearance requirements. If, as Appellants submit, the County's administration and implementation of the state statutes are subject to § 5 preclearance requirements, this Court need not reach the subsidiary question of whether the County is additionally required to obtain preclearance of the antecedent County ordinances.

In its opinion in the initial appeal of this case, this Court did not reach the question of whether state statutes have the prophylactic effect urged by the State, but it did determine a key issue on this appeal, *i.e.*, that the County ordinances enacted prior to 1983 did not receive the federal preclearance approval required by this Court's precedent. *Lopez*, 117 S.Ct. at 345. In reversing the lower court's order authorizing an election plan that had not been precleared pursuant to § 5 of the Voting Rights Act, this Court concluded its opinion by admonishing the County to satisfy its obligation to submit its voting changes to federal scrutiny "without further delay." *Id.* at 349. On remand, the lower court erroneously assumed that the subsequently enacted state statute incorporating the changes initially created by the County ordinances cured the illegal

effect of the County's failure to fulfill its preclearance obligations.

There is no warrant in the legislative history of the Voting Rights Act or the decisions of this Court for such a weakening of § 5. To the contrary, Congress expressly suspended state-enacted literacy tests, in counties covered by the Act, including counties located in states that were not fully covered. It would be incongruous to conclude that those same covered counties may escape the reach of § 5 by the operation of California State law.

A reading of the legislative history of the Voting Rights Act of 1965 confirms that Congress intended that state legislation, enacted by a state which itself is not a § 5-covered jurisdiction, should secure § 5 preclearance of such laws resulting in voting changes in § 5-covered counties. In accordance with that Congressional intent, courts have assumed that state legislation requires preclearance before implementation in covered counties, whether or not the state is covered, and whether or not the state law under scrutiny leaves the County any discretion regarding implementation.

Should there remain any doubt whatsoever that state law is subject to § 5 in partially covered jurisdictions, the county-wide at-large election scheme nonetheless requires preclearance because it is the product of County consolidation ordinances which reflect County policy.

The lower court's ruling, permitting covered jurisdictions to evade § 5's preclearance requirements by seeking enactment of state statutes reflecting the unprecleared changes, should be reversed.

A. The District Court Erred in Holding That California State Law Exempts County Judicial Consolidations from § 5 Preclearance Requirements.

A plain reading of § 5, its legislative history, and this Court's interpretation of its purpose and operation compel a reversal of the District Court's dismissal of this action. State statutes cannot insulate Monterey County from § 5 coverage, whether the state statutes reflect County policy, as Appellants argue, or not.

Section 5 of the Voting Rights Act requires preclearance of changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting." 42 U.S.C. §1973c. Following a thorough review of its legislative history, this Court has found that Congress intended § 5 to have the "broadest possible scope" reaching "any state enactment which altered the election law of a covered State in even a minor way." *Allen v. State Bd. of Elections*, 393 U.S. 544, 566-567 (1969). The statutory construction required to resolve the issue presented herein must begin with "a reading that will fully implement the congressional objectives." *United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. 110, 117 (1978).

1. Section 4(a)'s Suspension of Statewide Literacy Tests Evinces Congressional Intent to Subject State Law to § 5 Scrutiny in the Jurisdictions Partially Covered under § 4(a).

Sections 4(a) and 5 of the Voting Rights Act are inextricably connected, because § 4(a) contains the triggering mechanism for § 5 coverage of states and political subdivisions. 42 U.S.C. §§ 1973b, 1973c. However, § 4 is more than a simple coverage formula. It explicitly suspended statewide literacy tests in fully

and partially covered jurisdictions.[7] *Id.* The close connection between these two provisions mandates a consistent reading that Congress intended to bring state law under § 5 scrutiny in political subdivisions, even when the state itself is not covered.[8]

State literacy laws in partially covered jurisdictions were incompatible with § 4(a). Regardless of the origin of the election eligibility laws, regardless of whether covered counties exercised any discretion with regard to the administration of the laws, their operation was suspended in the covered counties by the Voting Rights Act from the moment the Attorney General published the necessary determinations with regard to the coverage formula. *Gaston County, North Carolina v. United States*, 395 U.S. 285, 287 (1969).[9]

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[7] See table of State literacy laws, entitled "Tests or devices as defined by sec. 4(c) of the proposed Voting Rights Act of 1965, S. 1564, and the States in which they are used." S. Rep. No. 162, 89th Cong., 1st Sess., pp. 42-43 (1965). The table of state literacy laws includes several partially covered jurisdictions, including California, Idaho, New York, North Carolina, and Arizona.

[8] This Court has previously taken note of the need to read sections of the Voting Rights Act consistently to give effect to Congressional intent. *Chisom v. Roemer*, 501 U.S. 380, 402-403 (1991) (noting connection between §§ 2 and 5 in determining that § 2, like § 5, should apply to judicial elections).

[9] Indeed, in defining the reach of § 5, Congress recognized that mandatory state legislation, even emanating from an uncovered state, could have a discriminatory effect on the political participation of minority voters in a particular county. Thus, Monterey County became subject to the § 5 preclearance requirements pursuant to a coverage formula that

This Court upheld § 4(a) of the Voting Rights Act as a proper exercise of Congressional power to enforce the policies embodied in the 15th Amendment which would be frustrated by conflicting state action. *South Carolina v. Katzenbach*, 383 U.S. 301, 325-327 (1966). In upholding the ability of the Voting Rights Act to render state law unenforceable in covered jurisdictions, this Court made no distinction between partially and fully covered states.

The statewide character of the suspended literacy laws did not prevent Congress from suspending them in covered counties within uncovered states, nor did it prevent this Court from upholding that exercise of Congressional authority, as to fully and partially covered jurisdictions. There can be no other conclusion but that Congress intended for the citizens of partially covered jurisdictions to be protected from the potential discriminatory effects of state law.

2. The Legislative History of the 1965 Voting Rights Act and its 1982 Amendments Require the Preclearance of State Statutes Which Affect Covered Political Subdivisions.

Congress intended that the § 5 preclearance provisions reach any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," irrespective of its source. In *South Carolina v. Katzenbach*, 383

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relied upon the presence of a statewide literacy test mandated by the California Constitution, even though the State of California itself was not covered, and even though Monterey County had no choice but to enforce the state law. Cal. Const. Art. II, sec.1, (repealed 1972); 42 U.S.C. §1973 b(b); 28 CFR Part 51 (Appendix), 35 Fed. Reg. 12354 (1970); 36 Fed. Reg. 5809 (1971).

U.S. at 308, this Court approved the implementation of the § 5 preclearance provisions because previous legislative efforts to "banish the blight of racial discrimination in voting" had been unsuccessful. The then existing case by case litigation approach was ineffective because "[e]ven when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." *Katzenbach*, 383 U.S. at 314. The congressional solution to combating "the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees" was to require the review of any change in voting procedure prior to its implementation. *Id.* at 335. These changes included the "subtle, as well as, the obvious." *Allen*, 393 U.S. at 565. *See also United States v. Bd. of Com'rs of Sheffield, Ala.*, 435 U.S. at 118 - 121. The decisions of this Court reflected the intent of Congress in enacting the 1965 Voting Rights Act to eliminate all voting changes which either were adopted pursuant to a discriminatory purpose or which had a discriminatory effect on minority voting strength in those areas subject to the § 5 preclearance provisions. Accordingly, the State of North Carolina had to seek federal approval of statutes when they resulted in a voting change in one of the § 5-covered counties even though the State of North Carolina was not itself subject to the Section 5 preclearance provisions.

A review of the legislative proceedings before the United States Senate illustrates this congressional intent. After President Lyndon B. Johnson delivered his address before a joint session of the House of Representatives and the Senate on March 15, 1965, regarding the right to vote, Congressional Record, Volume 111, 89th Cong., 1st Sess., at 5058 (hereinafter cited as C.R.), a bill, S. 1564, was forwarded to the Senate Committee on the Judiciary. C.R. 5403. Section 8 of S. 1564

required certain designated states and political subdivisions to submit "... any law or ordinance imposing qualifications or procedures for voting different than those in force and effect on November 1, 1964, ..." to the United States District Court for the District of Columbia for a determination that such law or ordinance "... will not have the effect of denying or abridging rights guaranteed by the fifteenth amendment." C.R. 5404.

During the course of the hearings before the Committee on the Judiciary, the United States Attorney General[10] stated that 34 counties in North Carolina, along with other southern states and political subdivisions would be subject to Section 3(a) which required the suspension of literacy tests and compliance with the Section 8 preclearance provisions. Senate Hearings at 17, 236 - 238.[11] Although only 34 counties in North Carolina were subject to the preclearance requirements of Section 8, no exemption from preclearance was made for the laws of the State of North Carolina. The following colloquy between the

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[10] The United States Attorney General, speaking on behalf of the administration, supported S. 1564. Hearings before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess., on S. 1564 to Enforce the 15th Amendment to the Constitution of the United States (1965), at 8 (hereinafter cited as Senate Hearings).

[11] There are repeated references in the Committee hearings to the fact that 34 counties in North Carolina are subject to the coverage criteria established by Section 3(a) of S. 1564. The State of North Carolina by itself was not separately designated. *See, e.g.*, Senate Hearings, Statements of United States Attorney General at 33, 243, Statements of Senator Ervin at 27, 138, 139, 243, 276, 283, 539, 597, 608, 640, 647, 675, 702, 726, 746, 797, 803, 838, 842, 844, Statement of North Carolina Board of Elections at 501, Statement of North Carolina Attorney General at 776 - 779.

United States Attorney General and North Carolina Senator Ervin occurred regarding the scope of Section 8:

> Senator Ervin. ... In other words, a State legislature has full power under the Constitution to pass laws regulating procedures for voting and prescribing qualifications. Yet, unless the State comes up here and gets in a lawsuit with the United States in the District Court of the District of Columbia, its laws cannot become effective on that subject, can they?
>
> Attorney General Katzenbach. The laws of the State and political subdivisions covered by that; yes, that is correct.

Senate Hearings at 236. Clearly this colloquy applies to the laws enacted both by the states and political subdivisions. A further discussion specifically identifies legislation from North Carolina as subject to the Section 8 preclearance provisions:

> Attorney General Katzenbach. I think it is quite a strong power, Senator. The effort is to prevent this constant slowing down process which occurs when States enact new laws that may clearly be in violation of the 15th amendment, but you have to go through the process of getting judicial determinations of that. It takes a long time. In the interval the purposes of the act are frustrated.
>
> Now, there may be better ways of accomplishing this. I do not know if

there are. There are some here I can imagine, a good many provisions of State law, that could be changed that would not in any way abridge or deny the right; and we, perhaps, except for the fact that some members of the committee, I think, including yourself, have had difficulty with giving the Attorney General discretion on some of these things - perhaps this could be improved by applying it only to those laws which the Attorney General takes exception to within a given period of time. Perhaps that would remove some of the burdens.

Senator Ervin. I take the State of North Carolina, the qualifications for voting in North Carolina which are prescribed in the State constitution.

Attorney General Katzenbach. Yes.

Senator Ervin. And it cannot be changed without a two-thirds vote of each house of the legislature.

Attorney General Katzenbach. Yes.

Senator Ervin. And it cannot be changed even then until the majority of the people of the State of North Carolina agree to it.

Attorney General Katzenbach. Yes.

Senator Ervin. And it would seem to me that it is efficacious to say that *North Carolina cannot legislate in this field, even by constitutional amendment, and make the legislation valid without getting such an adjudication*. It seems to me that is putting North Carolina in a mighty low state in the Federal structure.

Senate Hearings at 237 - 238 (emphasis added). Any remaining doubt as to whether the Section 8 preclearance provisions apply to the laws of North Carolina are removed when the following colloquy between Senators Ervin and Stennis is reviewed:

Senator Ervin. I want to ask a question and for this purpose I want to ask that section 8 of page 8 of the bill be copied here in its entirety. It reads as follows: [text of Section 8]

Now the Legislature of North Carolina has certain laws which are designed to allow the voting in Presidential election by these people who have moved into North Carolina and become permanent residents too late to qualify under our general voting laws to vote in elections, and other bills which are designed to provide for uniform administration of our election laws throughout the State.

I shall ask you if those bills should be enacted into law, they could not become effective under Section 8 until the State of North Carolina came up here, hat in hand, and begged the

District Court of the United States to judge that they are constitutional?

Senator Stennis. Yes, sir, the Senator is correct; it is cut off.

Senate Hearings at 830 - 831.

After the Committee on the Judiciary conducted its hearings, the Committee met in executive session to consider proposed amendments. C.R. at 28359. The revised S. 1564 was reported without recommendation by the Committee on April 9, 1965. C.R. at 28360. As a result of these amendments, the preclearance requirements were moved to Section 5 and there were two modifications to the federal pre-approval procedures. The first change consisted of removing the phrase "law or ordinance" from Section 8 and substituting the phrase "voting qualification or prerequisite to voting, or standard, practice, or procedure." This substitution served to further expand the type of changes encompassed within the purview of the Section 5 approval process. The second change incorporated an alternative method for securing Section 5 approval by submitting any proposed "voting qualification or prerequisite to voting, or standard, practice, or procedure" to the United States Attorney General for review. If the Attorney General did not object to the proposed voting change within a sixty-day period, the change could then be implemented by the State or the political subdivision. C.R. at 28358, 28360, 28364.

During the course of the congressional deliberations on the floor of the Senate, Senators Dirksen and Mansfield introduced on April 30, 1965, Amendment No. 124 in the nature of a substitute for the bill reported by the Committee on the Judiciary. C.R. at 9072. There was no change to Section 5 between the substitute amendment and the bill reported by the Committee on the Judiciary. *Id.* & 9073, 28360. Amendment No. 124 became known as the leadership substitute. C.R. at

9265. Senator Mansfield was the majority leader, C.R. 9075, and Senator Dirksen was the minority leader. C.R. 9072 & 11752. The absence of any changes to the Section 5 preclearance requirement reflected the view of the political leadership that federal pre-approval of voting changes was both important and necessary. *See, e.g.*, C.R. 8297 (Statement of Senator Mansfield). Moreover, Senator Hart, the Senator in charge of the bill, C.R. 11406, 11472, 11742, 11752, 28369, underscored the necessity for federal pre-approval:

> "This provision is a further appropriate assurance that 15th amendment rights will not be denied, either by laws currently in force, or by fertile imaginations. Each passing year there has been demonstrated by the enactment of new laws a settled policy to delay and frustrate the enforcement of the 15th amendment. What we have witnessed this past decade has been a prolonged fencing match, with each thrust of national power designed to protect Negro rights parried by new methods for curtailing those rights."

C.R. at 8303. In view of the importance of Section 5 in protecting minority voting rights in the face of new voting qualifications, prerequisites to voting, standards, practices or procedures with respect to voting, the political leadership did not permit any amendments which would either eliminate Section 5 or diminish its potential effectiveness. Accordingly there is no reference or even a suggestion in the hearings conducted by the Committee on the Judiciary or the deliberations on the floor of the Senate that the state laws of partially covered states[12] would be exempt from the Section 5

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[12] The Senate was well aware that the State of North Carolina itself would not be a designated jurisdiction subject to the Section 5 preclearance requirements. However, the Senate was also aware that 34 counties in North Carolina would in fact be subject to the bill's requirements. *See* Statements of Senator

approval process. On the contrary, there were efforts by Senator Ervin from North Carolina to amend the leadership substitute precisely because North Carolina state laws would be required to be submitted for Section 5 review.

On May 3, 1965, Senator Ervin offered Amendment No. 135.[13] C.R. at 9236. Amendment No. 135 proposed to delete, among other provisions, Section 5. In support of the amendment, Senator Ervin described the effect of Section 5 under the leadership substitute, Amendment No. 124: "Fourth, the bill undertakes to nullify or suspend the constitutional power of seven States namely, Alabama, Georgia, Louisiana, Mississippi, *North Carolina*, South Carolina, and Virginia, to establish and use literacy tests as qualifications for voting, *and to change their laws relating to election procedures and voting qualifications*." C.R. at 9272 (emphasis added). *See also* C.R. at 11733 (Statement of Senator Ervin: "... [T]he bill before the Senate provides that in seven States legislative acts adopted by those States in the plain exercise of their constitutional power cannot be made effective until they are approved by an executive officer of the Federal Government, the Attorney General of the United States, or by a Federal court sitting in the District of Columbia."), 11748 (Statement of Senator Ellender: "Under the pending bill, Alabama, Louisiana, Mississippi, Georgia, South Carolina, Virginia, and part of North Carolina are denied the right to enact legislation for the

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Ervin: C.R. at 6606, 8293, 8469, 8471, 9243.

[13] Previously Senator Ervin had offered Amendment No. 83, which sought to accomplish the same purpose of removing Section 5 from S. 1564. C.R. at 8989. Amendment No. 83 was subsequently withdrawn because of the expected introduction of Amendment No. 124 by the political leadership. C.R. at 9070.

establishment of further voter qualifications, or other legislation dealing with elections.").

In opposing Senator Ervin's amendment, Senator Hart, the manager of the leadership substitute, reiterated the importance of Section 5 in preventing the implementation of newly enacted laws which would perpetuate existing voting discrimination: "Section 5 would enable the Attorney General and the courts to insure against changing the laws since November of last year, which would have the effect of perpetuating discrimination." C.R. at 9794. Clearly Senator Hart's reference to the term "laws" is significant. Based upon this colloquy, there can be no doubt that Senator Hart included North Carolina as one of the states which would have to submit those laws affecting the 34 covered counties.[14] The effort by Senator Ervin to exclude the State of North Carolina from submitting for Section 5 review those state laws affecting the 34 covered counties was unsuccessful. Amendment No. 135 was overwhelmingly defeated by the Senate (64 votes against the amendment, 25 votes in favor, and 11 senators not voting). C.R. at 9807.

The legislative intent requiring submission of the laws of the State of North Carolina for Section 5 review when those laws affected the covered counties is further evidenced by a colloquy between Senator Talmadge and Senator Ervin:

> Senator Talmadge: Is it not true that the provision the Senator was discussing [Section 5] would

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[14] Senator Hart could have simply addressed the concern of Senator Ervin by stating that the laws of North Carolina would not be subject to the Section 5 preclearance requirements. However, no such statement is found in the Senate floor debate or deliberations before the Committee on the Judiciary.

give the Federal courts legislative powers affecting sovereign States?

Senator Ervin: Yes; despite the fact that tne courts have no legislative power at all under the Constitution.

....

Senator Talmadge: In this particular instance, a sovereign State would have no remedy for the deprivation of its rights before a Federal court having legislative power fixed upon it, contrary to the Constitution; is that not correct?

Senator Ervin: The Senator is correct. That is absolutely true.

Senator Talmadge: Does the Senator know of anything more monstrous than to say that a Federal district judge in the District of Columbia shall become a part of the legislative process of the State of North Carolina?

Senator Ervin: I do not. The most accurate nutshell interpretation of the Constitution of the United States was given by Chief Justice Salmon P. Chase, in Texas against White, when he said that the Constitution in all of its provisions looks to an indestructible Union composed of indestructible States.

If Congress has the power to say that a State cannot pass a law in an area

committed to it by the Constitution, and make that law effective without the consent of a Federal court, or the Attorney General of the United States, Congress has the power to destroy the States entirely. This bill goes a long way toward attempting to destroy seven States which the Constitution undertook to make indestructible."

C.R. at 10107.

The underlying premise of this colloquy is continued when Senator Talmadge offers Amendment No. 159 on May 14, 1965. C.R. at 10569. Amendment No. 159 sought to elimi nte Section 5 from the leadership substitute. C.R. at 10571. As stated by Senator Talmadge: "Yet the amendment in the nature of a substitute [Amendment No. 124, leadership substitute] would authorize the U.S. District Court for the District of Columbia to act as a third branch of these seven States [includes North Carolina, C.R. at 10572] with power, either to approve or to forbid legislation affecting elections in those particular States." *Id.* Furthermore in an additional colloquy, a specific reference was made to the applicability of Section 5 to the laws of the State of North Carolina:

Senator Ervin: Although a State has power under the Constitution to prescribe qualifications for voters and to prescribe procedures for elections, the bill provides that seven States could not change their laws on these subjects without first obtaining permission of the Attorney General of the United States, or coming anywhere from 250 to 1,000 miles to the District Court for the District of Columbia if the

> Attorney General should refuse to give them permission to change their laws.
>
> Senator Talmadge: The Senator is eminently correct. If a States tries to change the date of an election in *Raleigh, N.C.*, or in Atlanta, Ga., it must come to the District of Columbia and say, "Mr. Attorney General, will you please let us do that?"

C.R. at 10726 (emphasis added). In further remarks, Senator Talmadge stated:

> "The language which I seek to strike from the bill would require each of the *seven States*, every municipality within the affected area, and every county government which would be affected by the mathematical formula, not to make any changes whatever in their election laws except with the permission of the Attorney General of the United States and the District Court of the District of Columbia.
>
> The language in the pending bill is so phrased that it would relate to any voting qualifications or prerequisite to voting, standard, practice or procedure. No matter what kind of legislation, might be involved, whether it be from a city council, a resolution of the county commissioners, or an act of the legislature of the *States affected*, they would have to come to Washington, D.C. and beg the Attorney General to allow them to implement their own legislation and then, with his approval, would have to go before the District Court and beg once more that their constitutional powers to legislate be operative.
>
> ....

> ... However, the bill would say to the legislative bodies of the *seven States affected* that they cannot even pass a law changing an election day for the issuance of sewage revenue bonds or water revenue bonds without the approval of the Attorney General in the District Court for the District of Columbia, or that it is not possible to change entry fees for candidates for the legislature in the State of Georgia or in the *other affected States* without the approval of the Attorney General and the District Court for the District of Columbia."

C.R. at 10729 (emphasis added). As with the previous effort to eliminate the Section 5 requirements, the Senate refused to exempt the seven affected States. C.R. at 10730 (60 votes against the amendment, 19 votes in favor, and 21 senators not voting). After considering these and other amendments, the Senate passed S. 1564 on May 26, 1965. C.R. at 11752.

The far-reaching implications of § 5 restrictions on state law in partially covered jurisdictions were just as apparent and alarming to the House of Representatives from those jurisdictions as they were to the Senators. During the House debates, while meeting as a Committee of the Whole House on the State of the Union, C.R. at 15979, an effort was also undertaken to remove Section 5 from the House's voting rights bill. (H.R. 6400). On July 9, 1965, Representative Whitener of North Carolina offered an amendment to strike out all of Section 5. C.R. at 16256. In support of the amendment, Representative Kornegay, also of North Carolina stated:

> "There are several very disturbing provisions of H.R. 6400. One of these is section 5, which would require the legislation of the State to first get permission of the U.S. Attorney General or the Federal District Court in the District of Columbia, before it could change the election laws, in any manner, if one of its counties falls under the 50-percent provision of the proposed act.

> This section would in effect give to the Attorney General of the United States the power to veto or nullify an act passed by the legislature of the State of North Carolina."

C.R. at 16259. Thus there was a clear understanding in the House that Section 5 would require the preclearance of state statutes even if the state was not a designated jurisdiction when those laws effected voting changes in the state's § 5-covered counties.

The House of Representatives adopted H.R. 6400 on July 9, 1965. C.R. at 16285. The House substituted the language of H.R. 6400 into S. 1564 which was previously adopted by the Senate. C.R. at 16286. As a result of the differences between the Senate and House versions, a conference committee was established and a report was produced. C.R. 19187. The conference report was adopted by the House on August 3, 1965, C.R. at 19201, and by the Senate on August 4, 1965, C.R. at 19378, and the bill was signed by President Lyndon B. Johnson on August 6, 1965. C.R. at 19650.

A review of both the Senate and House bills does not reveal any major differences regarding the Section 5 preclearance requirement. C.R. at 11753 (Senate), 16483 (House). The conference report noted the following action on Section 5:

> "Section 5 of the House bill is similar to the Senate bill, except that the Senate version provides that a declaratory judgment approving the use of a new voting requirement will not bar a subsequent lawsuit to enjoin the use of such a requirement. The conference report adopts the House version with a clarifying amendment and with the Senate provision described above."

C.R. at 19190.

The legislative history of the 1982 amendments to the Voting Rights Act provides further support for requiring the submission of California's statutes which affect § 5-covered counties. During the legislative hearings before the Senate Subcommittee on the Constitution considering the 1982 amendments, the following colloquy occurred between Senator Orrin Hatch and Steve Suitts, then Executive Director of the Southern Regional Council:

> Senator Hatch. Thank you so much, Mr. Suitts. You complain about several enactments passed by the North Carolina Legislature which were not submitted under section 5. Is there any decision of the Supreme Court which holds that the legislature of a State which is only partially covered must submit its enactments to the Justice Department?
>
> Mr. Suitts. I do not know that there is a case precisely on that point, although I do not know that there has been any serious argument that that is not a requirement. It is pretty obvious that all those items [state statutes] which we identified do affect the 40 counties. There is a holding in the Federal court in North Carolina that a statewide law which affects one of the 40 counties must be submitted.

Hearings Before the Subcommittee on the Constitution of the Committee on the Judiciary, United States Senate on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 (Voting Rights Act), 97th Cong., 2d Sess., Vol. 1 (1983) at p. 599. In response to this

colloquy, the Senate Report[15] accompanying the passage of the 1982 amendments specifically stated: "While North Carolina, as a State, is not subject to section 5, the legislation in question affected North Carolina counties which are covered and, therefore, it should have been precleared." S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982) at 12, n. 32 [hereinafter cited as Senate Report]. This clear directive was ratified by Congress when the 1982 amendments to the Voting Rights Act were enacted. *See United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. at 134-135 (Court concluded that Congress ratified § 5 statutory interpretation as indicated by administrative practices of the Attorney General and legislative history showing that Congress agreed with that interpretation).

In summary, this review of legislative history provides compelling evidence for rejecting the attempt by the Appellee to exempt the State of California from the Section 5 preclearance requirements when state laws effect voting changes in Monterey County. This legislative history reveals that there was no question that the laws of the State of North Carolina, a partially covered Section 5 jurisdiction, would be subject to Section 5 approval. For example, this legislative intent is supported by the rejection of amendments offered by Senators Ervin and Talmadge to eliminate Section 5 from the leadership's substitute amendment (Amendment No. 124). In both instances, this legislative history demonstrates that Senator Ervin pursued the adoption of these two amendments in order to avoid having the State of North Carolina submit its laws for federal approval, the precise outcome advocated by the

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[15] Legislative committee reports are the best source for determining legislative intent. *Thornburg v. Gingles*, 478 U.S. 30, 43, n. 7 (1986)("We have repeatedly recognized that the authoritative source for legislative intent lies in the Committee Reports on the bill.")(relying upon Senate Report 97-417 for determining legislative intent of § 2 of the Voting Rights Act).

Appellee in this appeal. However, both amendments were overwhelmingly rejected by the Senate. This action by the Senate and Senator Hart's statements as manager of the leadership's substitute clearly provides the necessary documentary support for ascertaining the legislative intent of Congress in 1965.[16] Moreover, the Senate Report accompanying the 1982 amendments reaffirms this legislative intent.

As a result of this review, there can be no serious debate that Congress intended the State of North Carolina to submit its laws for Section 5 approval when those laws resulted in voting changes in its Section 5-covered counties. For this reason, the State of California must also submit its state statutes when they effect voting changes in Monterey County.

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[16] The reliance upon statements from both the proponents and opponents during the Senate deliberations over the passage of the Voting Rights Act has been previously utilized by this Court to ascertain the scope of the Section 5 preclearance requirement. *Allen*, 393 U.S. at 568 - 569. Accordingly, the statements made by Senators Talmadge, Ervin, and Hart, the manager of the leadership's substitute, and by Representative Kornegay, reflecting the intent of Congress to require the State of North Carolina to submit its laws for Section 5 approval provide compelling evidence for rejecting the Appellee's argument that the State of California is exempt from the Section 5 preclearance requirements.

3. This Court's Analysis of § 5 Issues in Partially Covered Jurisdictions Has Always Proceeded on the Correct Assumption That Congress Intended to Require Preclearance of State Statutes Effecting Voting Changes in § 5-Covered Political Subdivisions.

Consistent with congressional intent, this Court and lower courts have assumed, without exception, that statewide legislation affecting covered counties is subject to preclearance requirements.[17] An affirmance of the lower court's contrary opinion would conflict with this Court's treatment of other statewide schemes that were banned outright or subjected to federal scrutiny in partially covered jurisdictions.

North Carolina, for example, was only partially covered under § 4(a). When, in 1966, North Carolina's State literacy test was suspended in Gaston County by virtue of the County's inclusion as a covered jurisdiction under §4 (a), Gaston County unsuccessfully sought a declaratory judgment to reinstate the statewide literacy test. *Gaston County,* 395 U.S. at 287-288. In the course of deciding what evidence a lower court could properly consider under § 5, this Court assumed that North Carolina's partial coverage was no impediment to the suspension of its statewide literacy test in its covered political subdivisions. *See also Apache County, v. United States,* 256 F.Supp. 903 (1966) (three covered counties and the State of

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[17] Although the jurisdictional issue was not addressed directly in the cases set forth in this section, "a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us." *Brown Shoe Co. v. United States,* 370 U.S. 294, 305-306 (1962).

Arizona filed for declaratory judgment to reinstate the Arizona literacy test in the three counties).

A few years later, in *United Jewish Organizations v. Carey,* 430 U.S. 144 (1977), this Court was presented with a constitutional claim involving a state reapportionment statute that effected voting changes in the three counties in the State of New York which were covered by § 5. The State of New York, not covered by § 5, had previously filed for a declaratory judgment exempting three counties under § 4 ("bail out") procedures. The District Court for the District of Columbia, after a number of years of litigation, ordered the State to comply with the submission requirements of § 5 with regard to its statewide redistricting plans, and this Court affirmed. *New York ex rel. New York County v. United States,* 419 U.S. 888 (1974). *See United Jewish Organizations v. Carey,* 430 U.S. at 150, n. 3, *citing United Jewish Organizations v. Wilson,* 510 F.2d 512, 516 (2nd Cir. 1975). The federal appellate court later reviewing the constitutionality of those statewide plans noted that the State had not appealed the Attorney General's objection to the implementation of the plans in the covered jurisdiction. "Thus we can say unequivocally that the State of New York was in a position where it had to obtain Department of Justice approval of new district lines before it could hold a proper election under the Voting Rights Act." *Id.* at 517.

On appeal, this Court defended New York's attention to the preservation of minority voting strength in its covered counties, finding that "Congress was well aware of the application of § 5 to redistricting." *United Jewish Organizations v. Carey,* 430 U.S. at 158. This Court noted that in its 1970 extension of the Voting Rights Act Congress was cognizant of the danger of vote dilution through redistricting, and that the Senate and House Reports referred specifically to the Attorney General's role in "screening redistricting plans." *Id.* at 158, and n. 18, Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 94th Cong., 1st Sess.,

on S. 407, S. 903, S. 1297, S. 1409, and S. 1443, 124 (testimony of Nicholas Katzenbach)(1975)(hereinafter cited as 1975 Senate Hearings); S.Rep. No. 94-295, 94th Cong., 1st Sess., pp. 15-19 (1975); H.R. Rep. No. 94-196, 94th Cong., 1st Sess., pp. 8-11 (1975). Relying on this history, *and though § 5 did not cover the entire State of New York*, this Court found it "clear that new or revised reapportionment plans ... may not be adopted by a covered state" without preclearance. *United Jewish Organizations v. Carey*, 430 U.S. at 157. That holding would be implicitly reversed as to partially covered jurisdictions were this Court to agree with the lower court's holding that the California state statutes have converted the Monterey County ordinances into a statewide plan that does not require preclearance.

Nearly two decades later, again assuming § 5 applicability to state redistricting laws in partially covered jurisdictions, this Court in *Shaw v. Hunt*, 517 U.S. 899, 910-913 (1996), did not question the propriety of the Attorney General's § 5 review of North Carolina's redistricting plan as it affected the covered counties in that state.

Thus, this Court has consistently exercised its jurisdiction over issues involving preclearance of state law in partially covered jurisdictions. Prior to this decision, no court has ever held state law to be outside § 5's preclearance requirements by virtue of its legislative source alone. The lower court's ruling undermines this Court's vigilance to the potential discriminatory effect of statewide legislation on political subdivisions.

4. The District Court's Holding Conflicts with the Attorney General's Longstanding Construction of § 5 and the Attorney General's Consistent Practice of Requiring § 5 Submissions of State Enactments Affecting Covered Jurisdictions.

The District Court failed to accord proper deference to the Attorney General's interpretation of § 5 and the Attorney General's § 5 practices which repeatedly have required the submission of state statutes which effect voting changes in covered counties even if the state is not subject to § 5.

Pursuant to applicable regulations, the United States Attorney General evaluates statutes from states not subject to the § 5 preclearance provisions, when those statutes effect voting changes in § 5-covered political jurisdictions. *See* 28 C.F.R. § 51.23 ("When one or more counties or other political subunits within a State will be affected, the State may make a submission on their behalf.").[18] During the time in which political subdivisions in California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota have been partially covered by Section 5, the Department of Justice has received at least 1300 submissions of state laws applicable in covered political subdivisions. *See* Brief for the United States as Amicus Curiae Supporting Appellants, p. 13, n.3.

For example, the Attorney General has evaluated North Carolina's legislative redistricting plan as it affected § 5-covered counties. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess., p. 11

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[18] *See also*, 28 C.F.R. § 51.12 ("Any change affecting voting [is subject to preclearance requirement even if it] is designed to remove the elements that caused objection by the Attorney General to a prior submitted change ....").

(1982)(Letter of Objection of Asst. Attorney General, December 7, 1981).[19] Moreover, as previously stated, in the recent congressional redistricting in North Carolina, the plan was submitted to and evaluated by the Attorney General prior to the constitutional challenge filed by Anglo voters. *Shaw v. Hunt*, 517 U.S. at 902. *See also Johnson v. DeGrandy*, 512 U.S. 997, 1001 n. 2 (1994) (Florida congressional redistricting plan submitted for § 5 preclearance because five counties are subject to § 5).

The Attorney General's interpretation of § 5 coverage, its prior practice in accordance with that interpretation, and the apparent habitual acquiescence by affected states are the exact circumstances this Court found supportive in *Perkins v. Matthews*, 400 U.S. 379, 391-395 & n. 10, n. 11 (1971). Testimony that the Attorney General regarded changes in polling place locations and municipal boundaries as falling within the purview of the Act, and that "at least some" affected jurisdictions had submitted such changes for preclearance was given "great deference" by this Court in reaching the same

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[19] Although the State of North Carolina is not subject to § 5 preclearance, *see* 28 C.F.R. Part 51 (Appendix), the Attorney General has evaluated other North Carolina state statutes affecting § 5-covered counties within the state. 1975 Senate Hearings, Testimony of Hon. J. Stanley Pottinger, Assistant Attorney General, Civil Rights Division, Department of Justice, at 535, Exhibit 5 at 600, Letters of Objection, dated July 30, 1971 & September 27, 1971. There was also a letter of objection against the congressional, assembly, and senate redistrictings for the State of New York, although the state itself is not a § 5-covered jurisdiction. Letter of Objection, dated April 1, 1974. *Id.* at pp. 599 & 667.

conclusion. *Id., citing Udall v. Talman*, 380 U.S. 1, 16 (1965).[20] Similarly, testimony that the Department of Justice had reviewed "approximately 58 changes in election dates and approximately 10 changes in dates for candidate filing periods" pursuant to its regulations resolved "[a]ny doubt that these changes are covered by § 5." *N.A.A.C.P. v. Hampton County Election Com'n*, 470 U.S. 166, 178-179 (1985).

The Attorney General's interpretation of § 5, requiring the review of state statutes affecting § 5-covered counties, is consistent with the express language of § 5 as well as its legislative history.[21] Thus, this Court should defer to this

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[20] Judicial deference to administrative interpretations is due to the central role of the Attorney General in the § 5 preclearance process. *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. at 131 ("In recognition of the Attorney General's key role in the formulation of the Act, this Court in the past has given great deference to his interpretations of it."); *Blanding v. Dubose*, 454 U.S. 393, 401 (1982) ("We have frequently stated that courts should grant deference to the interpretation given statutes and regulations by the officials charged with their administration.") (agreeing with Attorney General's interpretation that receipt of certain documents constitutes a request for reconsideration of a previously issued § 5 objection letter, rather than a new submission of a voting change).

[21] This deference to the United States Attorney General's administrative interpretation of the § 5 preclearance provisions is not without limits. *See Presley v. Etowah County Com'n*, 502 U.S. 491, 508-09 (1992) (Court did not defer to an administrative interpretation provided by the Attorney General, because Congress specifically stated its intent that § 5 reached only those changes affecting voting); *Miller v. Johnson*, 515 U.S. 900, 922-923 (1995)(Although the Court has deferred to

longstanding administrative construction of § 5 and the Attorney General's consistent practice of requiring § 5 submissions of state enactments affecting covered jurisdictions in partially covered states.

5. Section 5 Changes Include Those Administered by a Covered Jurisdiction, Regardless of the Source of the Enactment That Effected the Change.

A § 5-covered jurisdiction, such as Monterey County, which "enacts or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968" must first secure approval from either the United States Attorney General or the United States District Court for the District of Columbia before such a voting change can be implemented. 42 U.S.C. § 1973c.

The District Court's focus on the legislative source of the voting change renders meaningless any distinction between "enacts" and "seeks to administer." Yet this is contrary to the ordinary meaning of these terms, *see Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."), and is contrary to this Court's "reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. 552, 562 (1990) (*citing Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837 (1988)). "Enact" is defined as "to make into law," whereas "administer"

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the Justice Department's interpretation of the Voting Rights Act in statutory cases, it is inappropriate to do so when the Court is engaged in constitutional scrutiny.).

means "to manage or direct." Webster's New World Dictionary (3rd College ed. 1988). Thus, voting changes, as set forth in § 5, are not limited to those changes which are initiated by the covered jurisdiction but also include those that are managed or directed by it.[22]

This distinction between "enact" and "administer" is also supported by California law which provides that, when elections are to be conducted at the local level, the local jurisdiction shall "administer" the election. In California Government Code §74784, for example, the state "enacted" a statute that directs a county official to "administer that election." Identical language is employed in numerous other state statutes. *See, e.g.*, Cal. Gov. Code §§ 26625, 26666, 26668, 72110, 72114, 73665.6(a), and 74820.1(b).

The court below further reasoned that "'seeks to administer'... must involve some exercise of policy choice and discretion by the covered jurisdiction" and that here "[t]he County, as a subordinate jurisdiction of the State, lacks the discretion to choose a voting plan that does not involve a county-wide district." J.S. App. 9, Order at 7. Neither the

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[22] The District Court's construction of § 5 is also flawed by failing to accord plain meaning to the term "*any* voting qualification." "Any" must be understood in the plural sense as all encompassing. 3A C.J.S. Any at 903 ("In this, its ordinary sense, it is a word which is broad and general, and comprehensive, and is broadly inclusive, and all embracing.")(footnotes omitted). Thus, "any" voting changes are not limited to those changes which are initiated by a covered jurisdiction but instead, must include all voting changes irrespective of their legislative origin. This interpretation mirrors the § 5 regulations. *See* 28 C.F.R. § 51.2 (definition of "Change affecting voting" refers to any voting change) and 28 C.F.R. § 51.12 (Section 5 applies to any voting changes).

plain language of § 5 nor this Court's construction of it even hint at the notion that "seeks to administer" only applies to a local jurisdiction when it is exercising discretion in its administration or implementation of an unprecleared state statute.

The lower court relied on *Young v. Fordice*, 520 U.S. 273, 117 S.Ct. 1228 (1997), to conclude that the exercise of discretionary policy choices was dispositive of the § 5 statutory construction issue. But *Young*'s analysis, arising in the context of whether a state could maintain a dual registration system, cannot be read so broadly. *Young* involved federal legislation —the National Voter Registration Act—that directly regulated states' voting practices, an area in which Congress' constitutional power to mandate such voting changes by the state is unquestioned. *See Smiley v. Holm*, 285 U.S. 355, 366 (1932); *Voting Rights Coalition v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996). *See also State of South Carolina v. Katzenbach*, 383 U.S. at 327. In enacting § 5, Congress was concerned about the potential discriminatory effects of voting changes by "a State or political subdivision," not changes mandated by Congress itself. The distinct factual context in *Young*, therefore, is inapplicable to the facts presented here. The lower court's reliance on *Young* to create a gaping hole in § 5 coverage—exempting voting changes by covered counties so long as those changes are subsequently incorporated into state legislation—is wholly inconsistent with this Court's teachings as subsequently reaffirmed last term in *Foreman v. Dallas County*, 117 S. Ct. 2357 (1997).[23]

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[23] Most of § 5's partially covered states operate, by law or by custom, to extend state legislative courtesy to local jurisdictions wishing to propose state enactments specific to that local subdivision. *See*, Brief for United States as Amicus Curiae, pp. 12-17 and citations therein. Thus, the District Court's view would allow Monterey County, and other political subdivisions, to escape § 5 scrutiny simply by requesting state codification of purely local legislation.

In *Foreman*, Dallas County argued that its change in voting practice was not subject to § 5 because the adoption of the voting change was discretionary and it was acting pursuant to a state statute which already had been precleared. In rejecting this argument, this Court held that, in determining whether § 5 applies, "[t]he question is simply whether the County, by its actions, *whether taken pursuant to a statute or not*, 'enacted or [sought] to administer any . . . standard, practice, or procedure with respect to voting different from' the one in place on November 1, 1972." *Id.* at 2358 (citing 42 U.S.C. § 1973c) (emphasis added).

Although *Foreman* involved an entire state which was the covered jurisdiction, this Court's analysis is controlling as to the crucial question here—whether a local jurisdiction "seeks to administer" a voting practice when its actions are taken pursuant to a state statute. *Foreman* answers this question in the affirmative and thereby fatally undermines the State's attempt to circumvent § 5. A county is "seeking to administer" a voting practice even when simply implementing a state statute. Thus, Monterey County's adoption of a county-wide election system is subject to preclearance whether now conducted pursuant to county ordinance or state law.[24]

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[24] The lower court's construction of § 5 is also inconsistent with *Perkins*. Under the lower court's decision, *Perkins* would have been decided differently. In *Perkins*, the city's change to at-large elections was mandated by state law and therefore, the county argued, "it had no choice but to comply with the [state] statute." *Perkins*, 400 U.S. at 394. This Court rejected that argument: "We have concluded, nevertheless, that the change to at-large elections required federal scrutiny under § 5." *Id.*

B. Assuming *Arguendo* That Section 5 Coverage is Triggered Only by Discretionary Acts on the Part of the Covered Jurisdiction, it is Triggered Here Where Monterey County Ordinances Established the County-Wide District.

If State election law is insufficient without more to trigger § 5 scrutiny, and the District Court is correct in construing "seeks to administer" as requiring some exercise of discretion beyond the implementation of an election scheme, Monterey County clearly made such a policy choice.[25] The relevant and

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Whether or not the § 5-covered jurisdiction had the discretion to adopt the voting change was not dispositive. Rather, the focus was on whether there was a change in voting procedures.

[25] Indeed, during oral argument before this Court, the State conceded that Monterey County was free to adopt the consolidation ordinances and that these consolidations were not mandated by State law.

"Question: ... Was the—Monterey County free to adopt the plans that it did—at the time that it took the actions that it did?

Mr. Stone: Yes. It's various consolidation ordinances—

Question: It wasn't mandated by State law?

Mr. Stone: No. State law permitted the counties to adopt—

Question: But it didn't require it?

Mr. Stone: No, although there is some confusion on the record in that respect."

Official Transcript of Proceedings Before the Supreme Court of the United States, *Lopez v. Monterey County*, October 8, 1996 at 35:18-36:5.

undisputed fact is that, without being subjected to § 5 preclearance, Monterey County ordinances *established* the county-wide district.

The judicial district consolidation process was originated and driven by Monterey County, not the State. J.S. 22. "Between 1972 and 1983, the County adopted six ordinances, which ultimately merged the seven justice court districts and the two municipal court districts into a single, county-wide municipal court." *Lopez* 117 S.Ct. at 344. While it is true that various pieces of state legislation also were directed at Monterey County's judicial system, this Court found that several of these laws actually "reflected changes in the County's judicial districts *resulting from the consolidation process*." *Id.* (emphasis added).

Moreover, none of the state statutes by themselves ever mandated the creation of a county-wide municipal court district. The 1979 statute, Cal. Stats. ch. 694, only created a single Municipal Court District. J.S. App. 32. However, prior to the enactment of the state statute, the Monterey County Board of Supervisors adopted on June 5, 1979, Monterey County Ordinance No. 2524, which consolidated the then three municipal court districts into one district named the Monterey County Municipal Court District. J.S. App. 94, First Amended Complaint at ¶ 40. J.S. App. 33.[26] Even at that point, the

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[26] The subsequent state statutes also did not establish a county-wide municipal court district. All of the statutes related to the number of judges assigned to the municipal court: Cal. Stats. 1983 ch. 1249, J.S. App. 35; Cal. Stats. 1985 ch. 659, J.S. App. 37; Cal. Stats. 1987 ch. 1211, J.S. App. 38 - 39; Cal. Stats. 1989 ch. 608, J.S. App. 40; Cal. Stats. 1993 ch. 1091, J.S. App. 42. The 1989 statute, although recognizing that there was a county-wide district in Monterey County, cannot be interpreted as establishing such a district. J.S. App. 8 (District Court held that 1989 statute did not establish a county-wide district).

municipal court district did not encompass the entire county. Monterey County Ordinance 2930 consolidated the remaining districts into a single county-wide municipal court district.[27] J.S. App. 79.

In fact, the state statutes alone are meaningless. The statutes did not define the boundaries of the judicial districts. Rather, the boundaries were defined by the various county ordinances. This fact is significant for two reasons. First, the absence of any boundary descriptions of the judicial district consolidations indicates that the statutes were not the exclusive legislative mechanism for the consolidations of judicial districts resulting in a county-wide district. The statutes need to be read in conjunction with the county ordinances. Second, the boundary changes occasioned by the county ordinances have yet to receive the necessary Section 5 preclearance. *Lopez*, 117 S.Ct. at 345. To the extent that the state statutes reflected these boundary changes, the statutes must also receive Section 5 approval.[28] This review of the relevant statutes and ordinances is fatal to Appellee's contention that the sole authority for conducting county-wide elections is the State's statutory scheme.

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[27] This Court has already held that the preclearance of Monterey County Ordinance 2930 did not serve to preclear the previous consolidation ordinances. *Lopez*, 117 S.Ct. at 344, 345. For this reason, this Court directed Monterey County to seek approval of these antecedent county ordinances.

[28] Changes in the size and composition of voting constituencies are changes subject to Section 5 preclearance. *Perkins v. Matthews*, 400 U.S. at 394 (change from district election to at-large election subject to Section 5 approval). *See also* 28 C.F.R. § 51.13 (e) (changes subject to Section 5 preclearance include "... changing to at-large elections from district elections, or changing to district elections from at-large elections ....").

Thus, the lower court cannot shield this voting change from § 5 scrutiny based upon the requirement "that it must involve some exercise of policy choice and discretion." This unprecleared scheme, whether currently the product of a state statute or County ordinances, *does* reflect the policy choices of Monterey County. *Lopez*, 117 S.Ct. at 348 ("at-large county-wide system undoubtedly 'reflect[ed] the policy choices' of the County").

C. Even If § 5 Does Not Apply to the State Statute's Implementation in Monterey County, the District Court Erred in Concluding that Antecedent County Ordinances Are Exempt From § 5 Preclearance Requirements.

According to the lower court, the county-wide district "was created by the 1979 amendment to [California Government Code] section 73560 and County Ordinance 2930." J.S. App. 8, Order at 6. And, the lower court concluded, "the 1979 amendment did not need preclearance, and Ordinance 2930 was precleared." *Id.* at 6, n. 4. But this Court already has found that, while the preclearance of the 1983 state statute "may well have served to preclear the 1983 County ordinance [2930]," the other antecedent consolidation ordinances are subject to § 5 requirements but "do not appear to have received federal preclearance approval." *Lopez*, 117 S.Ct. at 345. Thus, even if the lower court is correct that the 1979 state statute "did not need preclearance," the county-wide system itself cannot be implemented because the antecedent County ordinances have never been precleared.

These antecedent County ordinances consolidated judicial districts and modified the boundaries of these districts to create

the Southern and Central Judicial Districts.[29] The two judicial districts were subsequently incorporated in Monterey County Ordinance No. 2930 and consolidated with the existing municipal court district to create county-wide judicial elections. These antecedent County ordinances must secure § 5 approval. *Id.* at 345.

Yet the lower court here relied upon "superseding" changes in state law that purportedly "converted the County's judicial election scheme into a state plan thus eliminating the need for preclearance." J.S. App. 6, Order at 4. In a substantially similar context, this Court held that there is a "presumption that the Attorney General will review only the current changes

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[29] For example, the boundaries of the Central Judicial District were established as a result of a series of county ordinances dating from 1972. On November 1, 1968, the date of § 5 coverage, there were two justice court districts in the central part of the County - the Gonzales Judicial District and the Soledad Judicial District. J.S. App. 89, First Amended Complaint at ¶ 13. The County adopted several ordinances which modified the boundaries of these two justice court districts (Monterey County Ordinance No. 1852, adopted on February 1, 1972), *id.* at ¶¶ 18, 19, consolidated the two districts into the Soledad-Gonzales Judicial District (Monterey County Ordinance No. 1917, adopted on October 3, 1972), *id.* at ¶¶ 20, 21, adjusted the boundaries of the consolidated district (Monterey County Ordinance No. 2139, adopted on January 13, 1976), *id.* at ¶¶ 26, 27, renamed the district to the Central Judicial District (Monterey County Ordinance No. 2212, adopted on September 7, 1976), *id.* at ¶ 35, and adjusted the boundaries of the Central Judicial District, *id.* All of these county ordinances preceded Monterey County Ordinance No. 2930. This Court noted that none of these antecedent county ordinances have received the required § 5 preclearance. *Lopez*, 117 S.Ct. at 345, 348, 349.

in election practices effected by the submitted legislation, not prior unprecleared changes reenacted in the amended legislation." *Clark v. Roemer*, 500 U.S. 646, 657 (1991). A covered jurisdiction's submission of a "change from one number of judges to another in a particular judicial district does not, by itself, constitute a submission to the Attorney General of the prior voting changes incorporated in the newly amended statute." *Id.* at 658. If, as this Court held, subsequently enacted legislation that is submitted for preclearance cannot serve to preclear antecedent incorporated changes, then surely state legislation that is *not* submitted, even assuming *arguendo* that it is exempt from § 5, cannot serve to preclear the antecedent County ordinances here. For example, the 1979 statute refers to the North Monterey County Judicial District, J.S. App. 32, which is also mentioned in the 1977 statute. J.S. App. 30. However, neither of the two statutes defined the judicial district. The County through a series of ordinances defined the boundaries of the Castroville and Pajaro Justice Districts, consolidated those districts into one district, and renamed the district the North Monterey County Judicial District. *See, e.g.*, Monterey County Ordinance No. 2195, adopted on August 10, 1976 (changing boundaries of the consolidated district and renaming district). J.S. App. 65. Without incorporating these earlier changes by the County, the later-enacted state statutes would be meaningless.

The lower court's reliance upon "superseding" changes in state law also runs afoul of the principle that the "duty to obtain federal approval of new voting standards, practices, or procedures is a continuing one. It arises anew each time the defendant enacts or seeks to administer an uncleared voting regulation." *Dotson v. City of Indianola*, 514 F. Supp. 397, 401 (N.D. Miss. 1981), *aff'd*, 456 U.S. 1002 (1982). This construction is consistent with the plain language of § 5 which provides that "[w]henever" a covered jurisdiction "enact[s] or seek[s] to administer" a change in voting practice, preclearance must be obtained. 42 U.S.C. § 1973c.

There is no temporal limitation on the preclearance requirement nor any exception when subsequent legislation amends or "supersedes" the original voting practice change. "[A]ny" change in voting practice in the covered jurisdiction is subject to § 5 and remains so until precleared.

Nonetheless, the State seeks to immunize voting changes in the County from preclearance requirements by actions taken subsequent to the § 5 violation. But the county-wide system was indisputably created by County ordinances, almost all of which have never been precleared. That violation is a "continuing one" and cannot be cured by "superseding" legislation. *Dotson,* 514 F.Supp. at 401. To hold otherwise would sanction a County's enactment of unlawful changes so long as it was later able to obtain superseding state legislation. Section 5 should not be subject to such abuse, and a covered jurisdiction's citizens should not be so easily deprived of a remedy when confronted by unlawfully adopted electoral schemes.

Conclusion

As this Court recently noted in *Morse v. Republican Party of Virginia*, 517 U.S. 186, 209-210 (1996), "[t]he purpose of preclearance is to prevent all attempts to implement discriminatory voting practices that change the status quo." Here, it is undisputed that Monterey County repeatedly changed the status quo without subjecting such changes to § 5 review. *Lopez*, 117 S.Ct. at 345. Appellants respectfully request that the District Court's dismissal be reversed and remanded with an order directing the submission of the unprecleared County ordinances and State statutes for preclearance without further delay.

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